Supreme Court, U.S.
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No. 87-1591

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAUL SHERWOOD FRASER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner may take an interlocutory appeal from an order directing him or his representative to comply with 18 U.S.C. (Supp. IV) 3506(a), which requires nationals and residents of the United States to serve on the Attorney General any pleadings or documents filed in a foreign country in opposition to the United States government's request for evidence.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Cobbledick v. *United States*, 309 U.S. 323 (1940) 5
Grand Jury Proceedings, In re, 689 F.2d 1351 (11th Cir. 1982) 4
Grand Jury Proceedings, Vargas, In re, 723 F.2d 1461 (10th Cir. 1983) 6
Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, In re, 731 F.2d 1032 (2d Cir. 1984) 6
Grand Jury Subpoena (85-W-71-5), In re, 784 F.2d 857 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987) .. 6
Oberkoetter, In re, 612 F.2d 15 (1st Cir. 1980) 6
Parr v. *United States*, 351 U.S. 513 (1956) 6
Perlman v. *United States*, 247 U.S. 7 (1918) 4, 5, 6
Sealed Case, In re, 655 F.2d 1298 (D.C. Cir. 1981) 6
United States v. *Hasting*, 461 U.S. 499 (1983) 7
United States v. *Ryan*, 402 U.S. 530 (1971) 5, 6

Constitution and statutes:

U.S. Const. Amend. V 6
18 U.S.C. (Supp. IV) 3506 4
18 U.S.C. (Supp. IV) 3506(a) 2, 3, 4, 5, 6, 7
18 U.S.C. (Supp. IV) 3506(c) 3

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 834 F.2d 911.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1987. A petition for rehearing was denied on January 25, 1988 (Pet. App. 17). The petition for a writ of certiorari was filed on March 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 18, 1986, a federal grand jury sitting in the Middle District of Florida returned an indictment against

Larry Abraham (R.E. 3).[1] Two days later, federal authorities executed a search warrant at Abraham's residence in Montecito, California. Documents found at the residence showed that petitioner, an attorney who had represented Abraham, controlled four numbered bank accounts in Geneva, Switzerland (*id.* at 4). On April 21, the United States filed an official request with the Swiss government to obtain the records of petitioner's Swiss bank accounts (*id.* at 4-5; Pet. App. 4).

On May 3, the government told petitioner's attorney, Bernard Dempsey, that petitioner was the target of a grand jury investigation pending in Tampa, Florida. As a result, petitioner, Dempsey, and government agents met on May 26 to discuss a possible pre-indictment plea agreement. R.E. 4; Pet. App. 4-5.

In July, Swiss authorities notified the United States that a pleading had been filed in Switzerland opposing the release of petitioner's Swiss bank records. The Swiss authorities further advised the government that they would not release the bank records until that litigation was resolved. R.E. 5; Pet. App. 5.

The government later learned that petitioner had filed the opposition to the release of the Swiss bank records. Petitioner, however, had not served a copy of the opposition on the Attorney General, as required by 18 U.S.C. (Supp. IV) 3506(a) (R.E. 5; Pet. App. 5).[2] Accordingly, on September 4, 1986, the government filed in the United

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[1] "R.E." refers to the Record Excerpts filed with petitioner's brief in the court of appeals.

[2] Section 3506(a) (18 U.S.C. (Supp. IV)) provides in relevant part:

> [A]ny national or resident of the United States who submits, or causes to be submitted, a pleading or other document to a court or other authority in a foreign country in opposition to an official request for evidence of an offense shall serve such pleading or

States District Court for the Middle District of Florida a motion to require petitioner or his representative to comply with 18 U.S.C. (Supp. IV) 3506(a) and serve a copy of the opposition on the government.[3] R.E. 2, 3-7; Pet. App. 5-6.

2. On September 5, the district court granted the motion and ordered petitioner or his representative to serve the Attorney General with a copy of the opposition that had been filed in Switzerland (R.E. 10; Pet. App. 6). On September 22, petitioner filed a motion to vacate that order, arguing among other things that the district court lacked jurisdiction and venue and that the government had not properly served petitioner with its motion (R.E. 11-18; Pet. App. 6). The district court denied that motion on October 6. On October 16, petitioner filed a notice of appeal (Pet. App. 6).

3. The court of appeals dismissed petitioner's appeal, holding that the district court's order directing him to provide the government with a copy of the foreign pleading was "an interlocutory nonappealable order" (Pet. App. 13).[4] After reviewing the language and legislative history

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other document on the Attorney General at the time such pleading or other document is submitted.

Section 3506(c) (18 U.S.C. (Supp. IV)) defines "official request" to include

> a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

[3] The government served petitioner with a copy of its motion by mailing it to petitioner's attorney, Bernard Dempsey, at his office in Orlando, Florida (R.E. 8; Pet. App. 6).

[4] The court declined to address petitioner's arguments on the merits or the government's contention that petitioner's appeal was untimely because of his failure to file a notice of appeal within ten days after the entry of the September 5 order.

of Section 3506, the court of appeals concluded that the district court's order should be characterized as part of a criminal proceeding and, as such, was "akin to * * * an order compelling compliance with a discovery request" (Pet. App. 11). Accordingly, the court of appeals held, the district court's order was not appealable until petitioner disobeyed the order and challenged its validity during contempt proceedings.[5]

ARGUMENT

1. Petitioner contends (Pet. 13-20) that the district court's order is immediately appealable under the exception to the final order rule that this Court recognized in *Perlman* v. *United States*, 247 U.S. 7 (1918). Petitioner argues that requiring him to face contempt in order to perfect an appeal precludes meaningful appellate review, because both petitioner and his attorney have been directed to comply with the court's order, and because petitioner "has no control over the actions of his attorney" (Pet. 20). Petitioner thus asserts that *Perlman* authorizes his immediate appeal because he "is a powerless third party, the exact type of party the *Perlman* exception was meant to apply to" (*ibid.*).

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[5] The court rejected petitioner's claim that the order was immediately appealable because it also required petitioner's attorney to comply with Section 3506(a). The court distinguished cases such as *In re Grand Jury Proceedings*, 689 F.2d 1351 (11th Cir. 1982), which have permitted immediate appeals of orders directing attorneys to disclose allegedly privileged client information, on the ground that such cases "avoid the contempt requirement because [the orders] are directed *solely* to the attorney" (Pet. App. 16 n.6 (emphasis in original)). This case, the court pointed out, involved an order directed to petitioner and his representative, and thus "require[d] a contempt citation before being appealable" (*ibid.*).

Contrary to petitioner's suggestion, *Perlman* does not control this case. The district court's order, which was directed to petitioner "or his representative" (R.E. 10), places the responsibility to comply with the order solely in petitioner's hands, not in those of his unnamed representative. Because petitioner has complete control over the decision to comply with the court's order, he can obtain appellate review of the order through the ordinary course of challenging the order in a contempt proceeding.

In *Perlman* v. *United States*, supra, the district court ordered a court clerk to produce materials that were in the clerk's custody because they had been offered as exhibits in a lawsuit. The exhibits belonged to Perlman, who claimed they were privileged. This Court held that Perlman could take an immediate appeal from the order to produce the exhibits, because the clerk, as the third-party custodian, could not be expected to risk a contempt citation in order to secure Perlman's opportunity for appellate review. 247 U.S. at 12-13. Under these circumstances, Perlman would be "powerless to avert the mischief of the order" (*id.* at 13) unless he were granted the right of immediate appeal. See *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 325-329 (1940).

Unlike the situation in *Perlman*, the order petitioner challenges is not directed to a third party over whom he exercises no control. On the contrary, the order directs petitioner, either himself "or [through] his representative," to comply with Section 3506(a). The fact that the government followed normal procedures and served petitioner's counsel with its motion does not change the meaning of the court's order. Petitioner himself has the ability to choose whether and how to comply with the district court's

order. In other words, petitioner is not entitled to immediate appellate review because he

> is free to refuse compliance and * * * in such event he may obtain full review of his claims before undertaking any compliance with the [order].

United States v. *Ryan*, 402 U.S. at 533. The court of appeals thus correctly dismissed petitioner's appeal.[6]

2. Petitioner further contends (Pet. 8-12) that the court of appeals should have issued "an extraordinary writ" in the absence of an immediate appeal because the district court's order clearly "violated [his] procedural due process rights" (*id.* at 12). Petitioner's argument is meritless. In *Parr* v. *United States*, 351 U.S. 513, 520-521 (1956), this Court made clear that "[t]he extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals." As shown above, petitioner has an available and

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[6] For the same reasons, this case does not present this Court with an occasion to resolve the conflict among the courts of appeals concerning whether an individual, claiming a privilege, may invoke *Perlman* to appeal an order denying a motion to quash a grand jury subpoena issued to a third party. Compare *In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857, 859-860 (8th Cir. 1986) (appealable order), cert. dismissed, 479 U.S. 1048 (1987) and *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036 n.3 (2d Cir. 1984) (same) with *In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461, 1465-1466 (10th Cir. 1983) (nonappealable order) and *In re Sealed Case*, 655 F.2d 1298, 1301-1302 (D.C. Cir. 1981) (same) and *In re Oberkoetter*, 612 F.2d 15, 16-19 (1st Cir. 1980) (same).

Petitioner does not even raise a colorable claim of privilege as a basis for challenging the district court's order. Section 3506(a) establishes a mandatory duty to serve the Attorney General with the appropriate pleadings and documents. Moreover, petitioner may hardly claim any attorney-client or Fifth Amendment privilege in documents filed as a matter of public record in a foreign jurisdiction.

meaningful opportunity for judicial review of his claims should he persist in refusing to obey the district court's order.[7]

In any event, petitioner does not suggest how the use of different procedures in the district court could have produced a different result. Section 3506(a) imposes an absolute requirement that foreign pleadings of the sort filed on petitioner's behalf in Switzerland be served on the government. Although petitioner raised several procedural objections to the government's motion requesting a copy of that pleading, he raised nothing to suggest that he might ultimately be entitled to avoid the obligation imposed by Section 3506(a). For that reason as well, this is not an appropriate case in which to grant some form of extraordinary relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

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[7] Petitioner also suggests (Pet. 12) that this Court should exercise its "supervisory powers" and quash the district court's order. This novel suggestion ignores the fact that supervisory power can be invoked only in aid of jurisdiction, not to create jurisdiction in the first instance. Cf. *United States* v. *Hasting*, 461 U.S. 499, 505 (1983).

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